No. 80-620

In The

Supreme Court of the United States

October Term, 1980

JOHN J. AYOOB, HUGH IORFIDO, ROSS M. KEEFER, LEWIS E. KIRCHNER, JOSEPH LIBERATI, STEPHEN MIHALIC, ARTHUR L. SCHLEMMER, GEORGE L. SHAFFER, MILTON H. RICHAEL, individually and as District Magistrates in the County of Beaver and their successors in office,

Petitioners,

vs.

PATRICIA MORRISON, BLANCHE LOWE, RACHEL DAWKINS, GEORGE BLACK, and all others similarly situated,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE OF THE HONORABLE LAWRENCE H. COOKE, CHIEF JUDGE OF THE STATE OF NEW YORK

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INTEREST OF THE AMICUS CURIAE

The petition for certiorari of the petitioners in this action presents crucial issues concerning the scope of judicial immunity under 42 U.S.C. §1988. The United States Court of Appeals for the Third Circuit held that Congress, in enacting a right to award attorneys' fees for actions under certain civil rights laws, abrogated the common law rule that judges are immune from suit for monetary relief for acts performed in their official judicial capacities.

The *amicus curiae* is the Chief Judge of the State of New York and the Chief Judge of the New York State Court of Appeals. He is responsible for, *inter alia*, the administration and operation of the entire Unified Court System of the State. New York State Constitution, Article VI, §28. As Chief Judge, he must insure that the New York state courts operate effectively, free from any improper influences that may taint the impartial administration of justice. The decision of the Third Circuit in this action presents a direct threat to independent judicial decision-making.

BRIEF SUBMITTED PURSUANT TO RULE 36.1

The Honorable Lawrence H. Cooke, Chief Judge of the State of New York, submits this brief in *amicus curiae* pursuant to Rule 36.1 of the United States Supreme Court Rules with the consent of all of the parties.

SUMMARY OF ARGUMENT

The common law rule of absolute judicial immunity from suits for monetary relief is one of the underpinnings of the judicial system, evolving from the long-standing recognition that judges cannot properly perform their judicial roles if they are subject to harassment and intimidation through lawsuits for

monetary awards by dissatisfied litigants. Actions for attorneys' fees are no less a coercive instrument than actions for damages; the amounts of money involved are often substantial.

Congress can limit the well-established common law principle of judicial immunity only by express direction. *Pierson v. Ray,* 386 U.S. 547 (1967). In enacting 42 U.S.C. §1988, Congress did not expressly provide that the doctrine of absolute judicial immunity be abrogated. To the contrary, the debates in both the Senate and the House unequivocably indicate that the attorneys' fees bill was enacted to correct a legal technicality and to leave the common law unchanged. There is no legislative intent that the doctrine of absolute judicial immunity be subverted by monetary awards granted under the guise of attorneys' fees.

ARGUMENT

I.

JUDGES ARE IMMUNE FROM LIABILITY FOR ATTORNEYS' FEES IN ACTIONS PURSUANT TO 42 U.S.C. §1988.

A. The common law concept of absolute judicial immunity forecloses demands against judges for attorneys' fees.

"Few doctrines [are] more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction. . . ." *Pierson v. Ray, supra,* 386 U.S. at 554-555. This doctrine, prevailing in English jurisprudence for centuries, was established as the "American Rule" in *Bradley v. Fisher,* 13 Wall. 335 (1872).

Absolute immunity insures that "a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. . . ." *Id.* at 345; it enhances "principled and fearless decision-making." *Pierson v. Ray, supra,* 386 U.S. at 554; *Stump v. Sparkman,* 435 U.S. 349 (1978). "Absolute immunity is thus necessary to assure that judges . . . can perform their respective functions without harassment or intimidation." *Butz v. Economou,* 438 U.S. 478, 512 (1978).

Actions for attorneys' fees are no less coercive than actions for damages; attorneys' fees often are substantial, and the same interests underlying judicial immunity are thus involved — the fears of "intimidation" and the erosion of the public interest in an independent judiciary. Justice Powell, in his dissenting opinion in *Maine v. Thiboutot,* ____ U.S. ____, 100 S. Ct. 2502 (1980), presaged the onslaught of "harassment" and "intimidation" which might virtually eliminate the judicial independence of judges once they are exposed to liability for attorneys' fees, stating that "[t]here is some evidence that §1983 claims already are being appended to complaints solely for the purpose of obtaining fees . . . ingenious pleaders may find ways to recover fees in almost any suit against a state defendant." 100 S. Ct. at 2514.

Judges are an especially vulnerable target of these "ingenious pleaders"; though immune from damage actions pursuant to §1983, they continually will be subject to allegations of constitutional due process violations by reason of rulings made in cases over which they preside. It takes no great degree of legal skill to append a claim for injunctive or declaratory relief to an action for damages in order to preserve the right to a trial on the nonmonetary aspects of the claim, with the concomitant right to attorneys' fees, notwithstanding a dismissal of the monetary aspect of the relief sought. Indeed, issues

normally raised by the vehicle of a mandamus proceeding easily can be re-stated as constitutional claims against judges under the civil rights acts, regardless of whether a damage claim is asserted.

That "costs" rather than "damages" are the relief sought does not lessen the impact on judicial independence. Insofar as the liability of a judge is concerned, the label is irrelevant. *Cf. Johnson v. University of Bridgeport and Local 1199, Drug and Hospital Union,* ___ F.2d ___ (2d Cir., Docket Nos. 80-7350, 80-7374, decided August 28, 1980), in which the Court of Appeals for the Second Circuit noted that statutorily authorized attorneys' fees are no different from attorneys' fees that are a contractually stipulated element of damages. Attorneys' fees granted pursuant to §1988 are but another form of financial liability that can be used as a weapon against judges in violation of the very interests this Court has held protected by the concept of absolute judicial immunity.

Nor does it matter whether the demand for attorneys' fees is made against the judge in his official capacity, as opposed to his individual capacity. The cases applying absolute immunity to judges make no distinction as to how monetary awards ultimately may be paid; judicial immunity never has depended upon whether a state may have a "hold harmless" statute.[1] *See e.g.,* McKinney's Consolidated Laws of the State of New York, Public Officers Law, §17. The issue is whether the judge can be subject to the intimidation of a lawsuit that extracts a monetary

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1. Monetary awards paid out of a court's budget may have a significant inhibiting effect on judicial independence. Many judiciary budgets would be sharply affected by the payment of any monetary awards. This is particularly true of small localities, where an attorneys' fees award against a local magistrate may severely strain the local fisc and affect funding for court operations. It is a fiction to believe that judges would not be intimidated by the threat of a suit for attorneys' fees simply because the money would not come out of their own pockets.

award for acts performed by the judge. Application to judges of the attorneys' fees provision of §1988 would provide for the very type of intimidating litigation that has been foreclosed by the common law for centuries.[2]

B. Congress did not erode any existing common law immunities for judges in enacting §1988.

Absolute immunities so firmly rooted in the common law and supported by such strong public policy reasons are not easily abolished. *Imbler v. Pachtman,* 424 U.S. 409, 435 (1976) (concurring opinion); *Pierson v. Ray, supra,* 386 U.S. at 554; *see also, Owen v. City of Independence, Missouri,* ___ U.S. ___, 100 S. Ct. 1398, 1424 (1980) (dissenting opinion). Abrogation of such immunities must be "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it" (*Owen v. City of Independence, Missouri, supra,* 100 S. Ct. at 1409, quoting *Imbler v. Pachtman*) and is dependent on a "clear indication" that the Legislature "specifically" intended to abolish the common law immunity. *Pierson v. Ray, supra,* 386 U.S. at 554, 555; *cf. Supreme Court of Virginia v. Consumers Union of the United States, supra,* 100 S. Ct. at 1978.

The sole basis for the Third Circuit's erroneous conclusion that "Congress expressly considered judicial immunity and

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2. This brief does not address the question whether the absolute immunity of judges extends to suits for declaratory or injunctive relief absent monetary awards, a question left open by this Court in *Supreme Court of Virginia v. Consumers Union of the United States,* ___ U.S. ___, 100 S. Ct. 1967 (1980). Since, as set forth above, attorneys' fees are equatable with monetary damages for the purpose of determining the applicability of the doctrine of judicial immunity, there is no need for this Court to reach that question. If judges were absolutely immune from any lawsuits whatever, they, of course, would not be subject to §1988 attorneys' fees awards. *Consumers Union, supra.*

decided to abrogate it under §1988," is a single sentence in a House Report:

> "Furthermore, while damages are theoretically available under the statutes covered by [§1988], it should be observed that in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy. Consequently awarding counsel fees to prevailing plaintiffs in such litigation is particularly important and necessary if Federal civil and constitutional rights are to be adequately protected."[3]

The history of the enactment of §1988 shows beyond a doubt that this sentence is not indicative of the legislative intent. *Cf. Supreme Court of Virginia v. Consumers Union, supra.*

Bills to add an attorneys' fees provision to certain civil rights statutes were drafted by the Judiciary Committees of both

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3. A general reference to common law immunities hardly suffices to specifically abrogate judicial immunity. There is a significant difference between the qualified immunity enjoyed by certain executive officers and the absolute immunity of judges. Absolute immunity "defeats a suit at the onset"; qualified immunity "depends upon the circumstances and motivations of [the official's] actions as established at trial." *Imbler v. Pachtman, supra,* 424 U.S. at 419, fn. 13; *see Scheuer v. Rhodes,* 416 U.S. 232, 239 (1974). The rationale underlying absolute judicial immunity is to foreclose the intimidating threat of a trial; qualified immunities do not serve the same function. In the absence of any language specifically referring to judicial immunity, the sentence in the House Report, at most, can be referring only to qualified executive immunities, since attorneys' fees are post-trial awards — a stage not reached in cases involving absolute immunity. It must be concluded that the bare citation of *Pierson v. Ray* in a footnote in the House Report relates only to the holding in that case that police officers may raise the special good faith and probable cause defenses at trial for acts in their official capacities. *Pierson v. Ray, supra,* 386 U.S. at 551-552, 555-558.

the Senate (S.2278) and the House of Representatives (H.R.15460). The bills were substantially identical, except that the Senate bill did not contain a reference to Title IX of the Civil Rights Act. *See* 122 Cong. Rec. 31472. The Senate bill was debated and passed by the Senate in a version that added the reference to Title IX and, in addition, added a provision pertaining to proceedings under the Internal Revenue Code. 122 Cong. Rec. 33312. The House bill never reached the floor of the House; instead, the House debated and passed the Senate bill that already had been passed by the Senate. 122 Cong. Rec. 35130.

The Senate Report, by its Judiciary Committee [S. Rep. No. 94-1011, 94-1011, 94th Cong., 2d Sess. 1 (1976), *reprinted* in U.S. Code Cong. & Ad. News 5908] contains not a hint that any established common law immunities were to be affected by the bill. The stated purpose of the bill in the Senate Report was simply to make consistent the patchwork provisions for attorneys' fees in various civil rights legislation, in light of this Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1976), that statutory authority was needed to award attorneys' fees under those acts. S. Rep. No. 94-1011, *supra*, at 4; U.S. Code Cong., *supra*, at 5911. The Senate Report concludes (*id.* at 6, U.S. Code Cong. at 5913):

> "This bill creates no startling new remedy — it only meets the technical requirements that the Supreme Court has laid down if the Federal courts are to continue the practice of awarding attorneys' fees which had been going on for years prior to the Court's (Alyeska) decision."

Moreover, when the bill was debated on the floor of the Senate, nothing was said about common law immunities. 122 Cong. Rec. 31271, 31470-31483, 31487-31490, 31829-31835,

31846-31858, 31868, 32171-32172, 32175-32176, 32183-32185, 32296-32298, 32383-32384, 32387-32398, 32405, 32926-32927, 32929-32934, 33310-33315. As Senator Kennedy, the floor leader of the bill (122 Cong. Rec. at 31473), explained (*id.* at 31472):

> "The bill now before us, Mr. President, does not create any new legal remedies, nor does it expand our civil rights laws into new areas which Congress has not previously considered. It merely lends substance to the private enforcement of rights already authorized under existing civil rights laws."

The House debated the Senate bill, which already had been passed. Here, as well, nothing was said about immunities. *See id.* at 35114-35130. To the contrary, Representative Drinan, the author of the House bill (*id.* at 35116) stated:

> ". . . [T]here is no change in the substantive preexisting law in this case before this body at this time. We accept preexisting law, whatever it is . . . ." (122 Cong. Rec. at 35116).
>
> * * *
>
> "We do not create any new statutory right of action in the bill today." (122 Cong. Rec. at 35117).
>
> * * *
>
> "I think [attorneys' fees are] . . . all carefully regulated by a body of law which goes back at least 50 years, and this would not be necessary,

> namely, to put through a law at all had it not been for a technical decision in the U.S. Supreme Court." (122 Cong. Rec. at 35118).

Indeed, Respresentative Kastenmeier, the chairman of the House subcommittee studying these bills (122 Cong. Rec. at 35126), stated (*id.*):

> ". . . [T]his is only a first step and a rather limited and cautious one. It does not overturn law or practice, except the Alyeska case."

The authors of the House bill, in explaining the Senate bill to their colleagues, thus contradicted the one sentence in the House Report, relied on by the Third Circuit, referring to immunity defenses. The expressions of the authors of the bill are entitled to substantial weight, *see, e.g., Brown v. General Services Administration,* 425 U.S. 820, 828 (1976), and they should be held to be controlling here.

Even if that one sentence in the House Report can be given any weight in the face of the House debates, it cannot form the basis of legislative intent. The intent of Congress cannot be inferred from the report of one committee: Congress "as a whole" must be aware of an issue. *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 192 (1978). Where House and Senate reports differ as to the interpretation of language in a bill, the House Report cannot be relied upon where, as here, by passing the Senate bill without amendment, the House denied the Senate Committee and the entire Senate an opportunity to object to (or concur with) the interpretation written in the House Report. *Vaughn v.. Rosen,* 523 F. 2d 1136, 1142-1143 (D.C. Cir. 1975); *Hawkes v. Internal Revenue Service,* 467 F. 2d 787, 797 (6th Cir. 1972); *see* Davis, *Administrative Law Treatise,* (1970 Supp.) §3A.31 at 175.

In light of this legislative history, it was manifestly erroneous for the Third Circuit to infer congressional intent from a single sentence in a House Report that never was before the Senate, and the substance of which was contradicted in the Senate Report, the Senate debates and the statements by the floor leaders of the bill in the House itself. There is no "clear indication" that Congress "specifically" overrode the well-established immunity protecting judges against suits for monetary relief for acts in their judicial capacities. *Pierson v. Ray, supra.*

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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